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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re Marriage of CLAIRE and BARRY  
LEVINE.

B172368

(Los Angeles County  
Super. Ct. No. SD016629  
c/w WED046368)

CLAIRE LEVINE,

Appellant,

v.

BARRY LEVINE,

Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Trope and Trope, Thomas Paine Dunlap and Ronald A. Rale for Appellant.

Law Offices of Arthur Stein and Arthur Stein for Respondent.

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This appeal arises from a fight between the divorced parents of two adult children about whether the father is obligated to reimburse the mother for tuition and summer camp expenses paid by third persons, not the mother. The trial court rejected the mother's claim, and so do we.

## **FACTS**

### **A.**

Claire and Barry Levine married, divorced, remarried, and finally divorced again in 1986. They have two children, Jaclyn (now 25) and Jeremy (now 20).

The final judgment of dissolution gave primary physical custody of the children to Claire and provided that she would "fully support" them because Barry was "presently unemployed," with the proviso that Barry would contribute (in an amount to be negotiated) to the children's support when he became employed.

Three years later (in May 1989), Barry applied for an order to show cause "re child custody." In response, Claire applied for an order to show cause "re child support." Based on a stipulation negotiated by the parties, the judgment was modified in November 1989 to expand Barry's visitation rights with the children. The order modifying the judgment also provided:

"6. [Barry] shall pay for the children's tuition in private schools they are presently enrolled in and other private schools they may be enrolled in in the future, always considering the best interests of the minor children.

"7. [Barry] shall pay for the cost of the minor children's attendance at summer camp as is appropriate to their age and camping experience."

**B.**

Fourteen years later (in May 2003), Claire applied for an order to show cause "setting [the amount of] child support arrearages [owed by Barry] for [the] cost of private school and [the] cost of summer camp."

In a supporting declaration, Claire said Jaclyn "attended Village School from 1987 through 1990," that the "cost per year was \$6,500 for a total of \$26,000," and that "Barry paid no part of this amount"; that from "1991 through June 1993, Jaclyn attended Curtis School, where the tuition was \$12,500 per year for a total of \$25,000," and that "Barry paid no part of this amount"; that "from September 1993 through June 1997, Jaclyn attended Crossroads School," where the tuition varied from year to year for a total of \$49,472, and where "Barry paid none of the fees. . . ." *Claire did not say she paid any part of the fees, and the only document she offered was a letter from someone at Crossroads stating "how much tuition was paid" for Jaclyn, with no reference to the identity of the payor.*

In the same declaration, Claire said "Jeremy attended Village School from 1987 . . . through 1997," that the tuition "for Jeremy was \$6,500 per year for a total of \$58,500," and that "Barry paid nothing towards this amount"; that Jeremy started at Crossroads in 1997, where the tuition varied from year to year for a total of \$131,725, of which Barry "only paid a total of \$15,000," leaving a remaining "total cost for Crossroads [of] \$116,725"; and that "Jeremy attended Camp Manitou during the summers of 1990 through 1996," for a total cost of \$25,750. *Claire did not say she paid any part of these fees, and the only documents she offered were copies of a letter from someone at Crossroads in the same form as the letter showing the tuition for Jaclyn, and a letter from "Bob*

Marcus" at "Camp Manitou" stating the amount paid for Jeremy's camp but not identifying the payor.

**C.**

Barry (who is remarried and has three children by his current marriage) opposed Claire's request for reimbursement and moved to strike most of her declaration on various grounds (hearsay, lack of foundation, and so on).

In his supporting declaration, Barry said that, in the years between the modification order (1989) and Claire's current request for money (2003), Claire had "on numerous occasions" told him (in the presence of others) that "the original agreement was no longer operative," and that he "should disregard it outright." According to Barry, Claire said, "I don't want or need your money," "We do just fine without your help and I don't want it," "I would rather have you out of our lives and not coming to the house," "I would rather not have your money," "Use your money to take care of your wife and other kids." Claire "also made . . . numerous demeaning, mean-spirited and inflammatory comments about [Barry] to [his] children and other people," calling him such things as a "[p]athetic loser" and "a terrible businessman who would not support the kids even if [he] had the money." There are declarations from others who heard Claire's statements.

According to Barry, he repeatedly asked Claire to stipulate to a modification of the judgment so that his failure to pay would be legal, but Claire refused to go back to court or to sign anything, and told him, "If you bring it up again, just once, you better have all the money ready!" She said, "I'm tired of being ripped off by lawyers," and reminded him that she had "sued a few."

Barry explained that at one point when "things were peaceful" and "business was particularly bad" for him, Claire told him "she knew how to make money, . . . and that she ha[d] made more in three years of stock trading than [he] probably made in [his] entire life. She stated, 'Let me teach you how to make money in stocks. I know you are broke, so I will lend you \$5,000 to get started.'" She did just that and took him to a brokerage house where she helped him open an account, but she "never taught [him] how to do stock trading . . . ." He lost the \$5,000 but repaid Claire in full.

According to Barry, Claire remarried and "always had plenty of money and [he] always knew the kids . . . were well cared for[] financially." He "saw the way they lived [and knew Claire] did not need the money. Jeremy and Jaclyn are both adults now . . . and are in no need of these alleged arrearages. Jaclyn has over almost \$400,000 in a real estate asset alone, plus a large amount of cash. Jeremy lives in a two bedroom suite in a \$4,000,000 home in the Riviera section of Pacific Palisades[,] . . . drives a very expensive, customized new BMW [, and] gets everything he wants. He has many credit cards and spends luxuriously at restaurants, on clothing, etc. with no objection from Claire. . . ."

Barry says Claire "has amassed a very large fortune over the years, which she is adept at concealing by conveying assets to her domestic and business partners and to various trusts. . . . When we divorced, she was awarded the family residence . . . . After a mysterious fire, she sold the house and, having realized an enormous gain on the sale, used the proceeds to purchase an even more valuable property, now valued at approximately \$4,000,000 . . . . She is also a principal and chief investor in various music productions and distribution enterprises . . . ."

Meanwhile, Barry and his new family live "in a small, leased, 3-bedroom tract-style townhouse" and his children attend public schools. The only money he has is a recent inheritance from his parents "earmarked" for the younger children's college education, an estate plan conceived by his parents based on their belief that Claire would pay for everything needed by Jeremy and Jaclyn. (Barry's parents died within five months of each other, shortly before these proceedings were initiated by Claire.) And Barry is ill. He has "a brain tumor, hypertension, high cholesterol, and vertigo," all of which are aggravated by his confrontations with Claire about money.

**D.**

An evidentiary hearing was held.

Howard Pilch, a lawyer, testified that he was retained by Claire in 1991 to enforce the child support order, that he communicated with Barry, and that Barry said he could not afford to pay anything to Claire. Pilch had no recollection about the amount at issue.

Barry testified about the same facts set forth in his declarations, and called as witnesses some of the people who had heard Claire relinquish all claim to payment by Barry of child support and tuition.

Claire testified about the same facts set forth in her declarations, but still did not say she had paid the tuition or camp fees. When asked specifically whether she could tell the court how much she thought Barry owed to her for child support from September 1989 to April 2003 (excluding school tuition and camp fees), her only answer was that she would "have to guesstimate the

number," and she did not "know the exact number." Her first "guesstimate" was that he owed \$310,900 plus accrued interest of \$25,394. The trial court then asked, "Give me the number. You tell me. . . . How much do you want me to order? Give me a number." Claire answered, "\$850,000," less \$2,500 for the payments Barry had made over the years. Asked again, her answer was \$310,750, less the \$2,500, for support only, not including tuition or camp fees. When asked for a total amount due for school tuition and camp fees, she said \$301,447 (which was the total stated in her declaration).

Claire testified that she had no precise independent recollection about the amount paid for schools or camps, and she did not offer *any* documents other than those previously attached to her declaration (in which she asked for \$301,447). She testified that, in calculating the amounts owed by Barry for tuition, she "ask[ed] the school directly," and the school gave her the numbers. The court told Claire that it wanted to know what "backup documents" she used to "make up [her] claim for unpaid camp and tuition," and Claire said she "relied upon documents [she] received from the camps, documents [she] received from the school, and . . . contracts [she] found in relationship to money owed to the school." She also said "something was paid . . . by Barry," but she did not know if she had any records.

When Barry's lawyer suggested on cross-examination that Claire "never made a single payment for camp and school," Claire said that, with a few exceptions, she "always had to make payment in order for [the children] to attend school" -- but she did not have any checks because she doesn't "keep checks" or check registers or bank records of any kind. Claire then conceded that "others" had paid for the children's camp and tuition, and identified those

"others" as Jay Coggan (a lawyer she had dated, who wrote checks on her behalf), Jerry Goldstein (who has lived with Claire for 18 years), and Richard Leroy (whom she did not identify). Goldstein testified on Claire's behalf and said he had paid for the children's schools and camps (and other expenses) but he was not specific about the amounts paid and offered no documentation. He said he had an oral agreement with Claire that she would repay him when she "receives the money."

#### E.

At the conclusion of the hearing, the court dismissed Claire's request for reimbursement and made these findings of fact:

"The tuition and the summer camp are of a totally different nature [than child support] because I don't know what that was supposed to be. It is very clear to me that Claire . . . does not know how much the tuition was. [¶] She has some educated guess or understanding of what it was. She was giving me numbers based upon what she thinks the total obligation was, **but what we know is that it wasn't coming out of her pocket. She didn't make all of those payments. She had . . . other people making them.** [¶] She had Mr. Goldstein making them. She had Mr. Coggan making them. She had Mr. Leroy making them. It has not been demonstrated to the court exactly what those tuition payments were . . . . It is too vague.

"Now, we have Mr. Goldstein coming forward and saying, 'Look, I was making the payments. We have been living together for 18 years, so I made the payments. She made an oral agreement with me that she would cover them once she [received a] check[] from [Barry].' [¶] Some of these things go back to 1993, 1994. Is that even an enforceable agreement at this point? She could get away with not paying him. . . . [¶] I have some real difficulty with



respect to her claim for reimbursement of the tuition and the camp."

"[For a number of years, Claire made no effort to compel Barry to pay] yet she continue[d] to keep [the children] in private schools, but ha[d] other people paying it. [¶] She doesn't know what she spent for it. I can't say she is even legally responsible to pay back the people who made the payments for the school, but now what she is trying to do is go back. 'I want him now to pay all of the tuition.' I don't believe that she ha[s] satisfied the court what that obligation is [for] tuition or the summer camp. . . . [¶] . . .

"What does he owe? Nobody can tell me. It has been asked seven different ways. What does he owe? [¶] Let me say something, [Claire], just so you will know. You didn't keep the best records in the world. Is that a fair statement, ma'am, you didn't keep the best records? [¶] . . . [¶] Because of that, I am going to rule in favor of [Barry] on the request for determining the amounts of support owed for tuition and the summer camp. . . ."

"[The order to show cause] is dismissed with prejudice."  
(Emphasis added.)

The court entered a minute order pronouncing that the "court grants [Barry's] motion to dismiss [Claire's] claim regarding support owed for tuition and camp. . . . Dismissal is with prejudice."

## DISCUSSION

In a series of related arguments, Claire contends the trial court (1) should not have "dismissed" her claim, (2) abused its discretion by "granting Barry a windfall of not less than \$235,000" by eliminating his obligation to pay for the

children's tuition and camp, and (3) impermissibly deprived Claire of a vested property right. None of these claims have merit.

First, we reject Claire's contention that the trial court's use of the word "dismissed" (rather than "denied") somehow means the trial court failed to decide the factual issues presented by the evidence. Assuming without deciding that an order to show cause, once issued, must be granted or denied rather than dismissed, it is plain that the trial court heard the evidence, found that Claire had failed to meet her burden of proof, and determined on the merits that Claire was not entitled to recover any amount from Barry for tuition or camp fees. No more was required. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [a decision correct on any theory will be affirmed on appeal].)

Second, we reject Claire's contention that the trial court gave Barry a windfall by "retroactively eliminating" his obligation to pay for the children's tuition and camp fees. Based on substantial evidence (as outlined above), the court found (expressly or by necessary implication) that the children's tuition and camp fees had been paid by third persons, that Claire did not establish that she had a duty to reimburse any of those third persons, and that the purpose of the November 1989 agreement (and order) was to have Barry reimburse Claire for the amounts **she** paid for tuition and camp, not to provide a windfall for her when third persons paid those expenses on her behalf. These factual findings, which are binding on appeal (*Foley v. Foley* (1963) 214 Cal.App.2d 802, 808), show that Claire is simply wrong -- the court's order means that neither party gets a windfall, and that both benefit from the largess of the third persons who paid for the children's expenses.

Third, even if we found that Barry had an abstract obligation to pay for the children's tuition and camp fees without regard to whether those expenses were advanced by Claire or someone else, we would affirm the trial court's order -- because Claire failed totally and completely to meet her burden of proof. She did not have cancelled checks from any payor, or anything more than summaries from the schools. No court can "determine arrearages" (as Claire requests) when the moving party fails to present evidence of the amount of those arrearages.

Finally, we note that our rejection of Claire's claims on the merits makes it unnecessary to decide whether her claim is barred by laches.

#### **DISPOSITION**

The order is affirmed. Barry is awarded his costs of appeal.

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VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.